Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-68

IN THE

Supreme Court of the United States

October Term, 1980

CINDY FORET
Appellant

v.

UNITED GAS PIPELINE COMPANY, INC.
Respondent

On Appeal from the United States Court of Appeal, Fifth Circuit, New Orleans, Louisiana

JURISDICTIONAL STATEMENT

HUNTINGTON E. DOWNER
WAITZ, DOWNER & BEST
423 Goode Street
Houma, Louisiana
Attorney for Appellant

MICHAEL J. SAMANIE
LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Avenue
Houma, Louisiana
Attorney for Appellant

HERBERT W. BARNES
LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Avenue
Houma, Louisiana
Attorney for Appellant

NO._____

IN THE

Supreme Court of the United States

October Term, 1980

CINDY FORET
Appellant

v.

UNITED GAS PIPELINE COMPANY, INC.
Respondent

On Appeal from the United States Court of Appeal, Fifth Circuit, New Orleans, Louisiana

JURISDICTION STATEMENT

OPINION BELOW

The Opinion of the United States Court of Appeal for the Fifth Circuit in New Orleans, Louisiana is not reported and is set forth in the Appendix, infra pages.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 (1), this being an appeal which draws into question the correctness of the holding of the lower court refusal to recognize and apply maritime principles of strict liability in regards to a maritime wrongful death.

II.

Jurisdiction of this Court is also invoked pursuant to 28 U.S.C. §1254 (2), this being an appeal which draws into question the extent and scope of this court's holding in *Morangne v. States Marine Lines, Inc.*, 398 U.S. 375, (U.S. Sup. Ct. 1970), and the lower court's refusal to apply the legal principles of Louisiana law regarding strict liability because of that court's belief that such application is contrary to the holding of *Moragne*, supra.

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

STATUTORY PROVISIONS INVOLVED

This case involves Louisiana Civil Code Articles 660, 2317, and 2322 which provide as follows:

Article 660:

> The owner is bound to keep his buildings in repair so that neither their fall nor that of any part of their materials may cause damage to a neighbor or to a passer-by. He is answerable for damages caused by his neglect to do so.

Article 2317:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

III.

Article 2322:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

QUESTIONS PRESENTED

Whether general maritime law recognizes legal principals of strict liability for damages caused by a defective or hazardous instrumentality in the custody and control of another.

Whether the Court of Appeal erred in its holding that the *Moragne* decision prohibits consideration and application of Louisiana strict liability law and principles in a maritime wrongful death action on navigable waters within Louisiana's territorial boundaries.

TABLE OF CONTENTS

Page

OPINION BELOW I
JURISDICTION I
STATUTORY PROVISIONS INVOLVED..... II
QUESTIONS PRESENTED..... III
TABLE OF CONTENTS..... IV
TABLE OF CASES..... V, VI
TABLE OF STATUTORY PROVISIONS VI
STATEMENT 1
1. PRIOR PROCEEDINGS 1
2. THE FACTS IN THE CASE AT BAR 2
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 4
THE FEDERAL QUESTIONS ARE SUBSTANTIAL... 5
I. THE APPELLATE COURT ERRED IN ITS FAILURE TO RECOGNIZE GENERAL MARITIME STRICT LIABILITY LAW AND PRINCIPLES..... 5
II. THE APPELLATE COURT ERRED IN ITS REFUSAL TO SUPPLEMENT AND AUGMENT THE GENERAL MARITIME LAW WITH LOUISIANA STRICT LIABILITY LAW AND PRINCIPLES..... 6
CONCLUSION..... 12

APPENDICES

OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA 13
JUDGMENT OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA 19

NOTICE OF APPEAL FILED WITH THE CLERK OF COURT FOR THE FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA 20
CERTIFICATE OF SERVICE 22

TABLE OF CASES

Page

1. *Alcoa Steamship Co. v. Charles Ferran and Company,* 383 F. 2d 46, 50 (5th Cir., 1967) 7
2. *Baggett v. Richardson,* 473 F. 2d 863, 864 (5th Cir., 1973) 6, 7
3. *Daigle v. Point Landing Inc.,* 616 F. 2d 825 (5 Cir. 1980). 17
4. *Dennis v. Central Gulf Steamship Corporation,* 453 F. 2d 137, (5th Cir., 1972) 10, 17
5. *Hess v. United States,* 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960) 9
6. *Hogge v. S.S. Yorkman,* 434 F. Supp. 715, (D.C. Md. 1977) 5
7. *Hornsby v. Fish Meal Company,* 5 Cir., 1970, 431 F. 2d 865 10
8. *Just v. Chambers,* 1941, 312 U.S. 383, 390, 61 S. Ct. 687, 692, 85 L. Ed. 903, 908 ..... 7, 8, 9
9. *Lindsey v. McDonald Douglas Aircraft Corp.,* 450 F. 21631, (8th Cir., 1972) 5
10. *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (U.S. Sup. Ct. 1970) ..... II, 2, 5, 10, 17

11. *M/T Alva Cape,* 405 F. 2d 969, 970 (2d Cir., 1969).....9
12. *Romero v. International Terminal Operating Co.,* 1959, 358 U.S. 354, 391 N. 3, 79 S. CT. 468 3 L. Ed. 2d 368 10
13. *St. Hilaire Moye v. Henderson,* 496 F. 2d 973, 980 (8th Cir., 1974) 6, 9
14. *S.S. Philippine Jose Abad Santos v. Bannister,* 335 F. 2d 595, 597 (5th Cir., 1974).....7
15. *The S.S. Samovar,* N. D. Calif. 1947, 72 F.Supp 574, 584.....7
16. *The Sea Gull,* 21 Fed Cas. 909, 910 (No. 12, 578) (C.C. Md. 1865) 10
17. *Soileau v. Michlos Drilling Co.,* 302 F. Supp. 119, (W.D. La. 1969) 5
18. *Spinks v. Chevron Oil Co.,* 507 F. 2d 216 (5 Cir. 1975) 15, 16
19. *The Tungas v. Skovaard,* 358 U.S. 588, 594, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959) 7
20. *Watz v. Zapata Off-Shore Co.,* 431 F. 2d 100, 113 (5th Cir., 1970) 7
21. *Winter v. Eon Production, LTD,* 433 F. Supp. 742, Ed. La. (1976) 10

TABLE OF STATUTORY PROVISIONS

1. General Maritime Law and Commerce, Volume 10, No. 2 *Choice of Law in a Federal Admiralty Court,* by James P. Laughlin, January 2, 1979.....7
2. Louisiana Civil Code Articles:
Article 660 II
Article 2317 II
Article 2322.....III

NO._____

IN THE

Supreme Court of the United States

October Term, 1980

CINDY FORET
Appellant

V.

UNITED GAS PIPELINE COMPANY, INC.
Respondent

On Appeal from the United States Court of Appeal, Fifth Circuit, New Orleans, Louisiana

JURISDICTION STATEMENT

STATEMENT

1. Prior proceedings.

Appellant, Cindy Foret, filed this suit in admiralty for the death of her husband in a boating accident on November 29, 1977, which occured in a pipeline canal constructed and maintained by the defendant-appellee, United Gas Pipeline Company, Inc., (hereinafter referred to as respondent). The accident involved the collision of a vessel wherein plaintiff was a guest passenger with a piling located close to the center of the respondent's canal near the intersection of the canal and Bayou Chauvin in Terrebonne Parish, Louisiana.

The case was tried before the Honorable Charles Schwartz, Jr., Judge for the United States District Court, Eastern District of Louisiana. The district judge held that the piling at issue was not a legal cause of the death of plaintiff's decedent and dismissed her suit against the defendant.

Appellant appealed this decision to the United States Court of Appeal, Fifth Circuit in New Orleans, Louisiana. The appellate Court upheld the trial court's decision insofar as respondent was concerned and in so doing refused to recognize and apply maritime principles of strict liability and further refused to apply Louisiana law and principles of strict liability as being contrary to this Court's holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, (U.S. Sup. Ct. 1970). It is from this final judgment that appellant seeks review.

2. The Facts in the Case at Bar.

On November 29, 1977, Daniel Foret, Paul C. Crochet and Donald Lambert were proceeding west on a canal located in south Terrebonne Parish, Louisiana which was constructed and maintained by the defendant, United Gas Pipeline Company, Inc. Mr. Crochet was operating a 16 foot fiberglass motorboat owned by Mr. Lambert at an approximate speed of 15-20 miles per hour. At the intersection of the United Gas canal and Bayou Chauvin the vessel struck a wooden piling which was in the center of said canal and extended some 14 inches above the water. It was obstructed by water hyacinths.

As a result of striking this piling, the occupants were thrown from the boat into the water. Mr. Crochet was the sole survivor.

At the time of the accident, the occupants were returning from a hunting trip. In accordance with water safety rules and regulations, there were three life preservers in the boat. Moreover, all of the occupants were wearing hip boots.

The evidence showed that sometime in the early 1950's defendant-respondent placed a floating boom at this intersection for the purpose of preventing water hyacinths from entering the United Gas canal. This boom was anchored by piling(s) and kept padlocked. To the best knowledge of present day employees, United Gas exercised sole control of this canal. Even to this day, notwithstanding the removal of this boom, United Gas has the sole right of way for this canal and its pipeline. It alone controls and maintains them. The piling at issue at some time in the past was located on the very edge or side of the United Gas canal. As indicated by the respondent's own employees, this piling anchored the water hyacinth boom. Over a period of time the area eroded to the extent that at present the piling at issue is 15 feet from the edge of the canal and is situated in the center of what has now become the channel of navigation of the canal. Moreover, as on the day of the accident, it is often obscured by water hyacinths.

The facts revealed that this piling and the obvious hazard which it posed for navigation had been known to the defendant for a substantial period of time. Nevertheless it was present and unmarked on November 29, 1977.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In argument contained in her pretrial memorandum, post-trial memorandum and appellate brief, appellate asserted the application of maritime strict liability principles and the supplementation of the general maritime law by Louisiana's law and principles of strict liability for an accident occurring within its territorial boundaries. At all stages of these proceedings, maritime strict liability principles were not recognized nor applied. Furthermore, the trial and appellate courts refused to supplement the general maritime law with Louisiana's law and principles of strict liability on the ground that such a supplementation would allegedly be contrary to the *Moragne* decision.

The application and effect of strict liability principles have not been extensively addressed by courts in admiralty, and certainly not by this Court. Therefore, in light of the national trend towards a standard of strict liability, it is respectfully submitted that this Court should address the questions presented in this case.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The lower court's failure to recognize strict liability principals in the general maritime law has resulted in an unwarranted restriction of the intent and purpose of admiralty law concerning the protection of life and property in navigation upon the waters within the territorial limits of the United States.

Furthermore, the lower court's refusal to supplement and augment the general maritime law with Louisiana strict liability law and principles was the result of that court's misinterpretation and misapplication of this court's holding in *Moragne v. States Marine Lines, Inc.,* supra.

I

THE APPELLATE COURT ERRED IN ITS FAILURE TO RECOGNIZE GENERAL MARITIME STRICT LIABILITY LAW AND PRINCIPLES.

The general maritime law is no stranger to the principles of strict liability. See *Lindsey v. McDonald Douglas Aircraft Corp.,* 450 F. 21631, (8th Cir., 1972) and *Soileau v. Michlos Drilling Co.,* 302 F. Supp. 119, (W.D. La., 1969) where courts in admiralty utilized strict liablilty principles in the area of products liability. Indeed, even the maritime doctrine of unseaworthiness is a species of strict liability. *Moragne v. States Marine Lines, Inc.,* supra.

The attempt by courts in admiralty to keep up with the trend of tort law towards strict liability is perhaps illustrated best by the case of *Hogge v. S.S. Yorkman,* 434 F. Supp. 715, (D.C. Md. 1977) which was also concerned with an allision. The *Hogge* court held as follows:

> The general proposition which can be derived from the cases is that a private party with *custody of a hazardous instrumentality* cannot be heard to say that its duty to use due care in the operation of the instrumentality and the use of warning devices is exhausted merely because it has complied with all applicable laws and regulations. Nor can it completely delegate its duties to some government agency with jurisdiction over, or responsibility for, the instrumentality. (emphasis added.)

It is respectfully submitted that the strict liability principles already recognized and applied in general maritime law should have been considered and applied in the allision at bar. The lower courts erred by not doing so.

II.
THE APPELLATE COURT ERRED IN ITS REFUSAL TO SUPPLEMENT AND AUGMENT THE GENERAL MARITIME LAW WITH LOUISIANA STRICT LIABILITY LAW AND PRINCIPLES.

Prior to the *Moragne* decision, courts in admiralty applied state wrongful death statutes in order to provide a remedy to survivors of persons killed during maritime activity upon navigable waters. This supplementation of maritime law was done via the maritime augmentation doctrine whereby admiralty courts may apply state law by express or implied reference or when the general maritime law is incomplete. *St. Hilaire Moye v. Henderson,* 496 F. 2d 973, 980 (8th Cir., 1974); *Baggett*

v. Richardson, 473 F. 2d 863, 864 (5th Cir., 1973); *Alcoa Steamship Co. v. Charles Ferran and Co.,* 383 F. 2d 46, 50 (5th Cir., 1967); *S.S. Philippine Jose Abad Santos v. Bannister,* 335 F. 2d 595, 597 (5th Cir., 1974); *The Tungas v. Skovgaard,* 358 U.S. 588, 594, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959).

Another method by which state law has been applied in general maritime cases is through maritime choice of law. See generally, *Choice of Law in a Federal Admiralty Court;* by James P. Laughlin, appearing in Volume 10 No. 2, General Maritime Law and Commerce, January 2, 1979. This doctrine is further explained in *Watz v. Zapata Off-Shore Company,* 431 F. 2d 100, 113 (5th Cir., 1970) as follows:

> "Admiralty precedent lends partial support to these concerns of conflicts law. In *Just v. Chambers,* 1941, 312 U.S. 383, 390, 61 S. Ct. 687, 692, 85 L. Ed. 903, 908, the Supreme Court observed that the maritime law was not a complete and perfect system and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as a basis of its administration. Enlarging on this point, the court in *The S.S. Samovar,* N.D. Calif. 1947, 72 F. Supp. 574, 584, said:
>
> > 'As stated by the Supreme Court in the latest of these cases: "With respect to maritime torts. . . the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when . . . not hostile to the

> characteristic features of the maritime law or inconsistent with federal legislation." (citing *Just v. Chambers*).
>
> By the same token, where the common law of a state in whose territorial waters a maritime tort occurs has been modified or supplemented so as to impose on manufacturers or builders a duty of care to persons not "in privity", a court of admiralty should recognize that duty and enforce the liability proximately resulting from a breech thereof, if adoption of the state rule "works no material prejudice to . . . maritime law." '

We proceed first to discover what the maritime principles are. The source of substantive American admiralty law originally was the general maritime corpus that had grown up among the commercial nations. As time progressed, however, litigated problems narrowed to more peculiarly national issues . . Admiralty courts have felt free to cull what they considered the best principles from the decisions of various courts and from treatise and testwriters . . . (Friendly, J., taking from 'all manner of "respectable" authority, Bohlen, Prosser, Seavey, and cases from California, New York, Tennessee, Texas, Wisconsin, not to mention English cases. Some are maritime and some are not. In the end, the rule applied is substantially the common law

rule.' . . . . Thus, in *Kermarec,* the Supreme Court declared that the standard of care for shipowner "must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate commonlaw concepts'. In fulfilling that function, the Supreme Court rejection the 'seamantic morass' of the common law and its 'conceptual distinctions' 'foreign to (admiralty's) traditions of simplicity and practicalty' . .

Although the process has afforded reasonably definable standards for shipowners, seamen, and others related to maritime contracts, the standards for a case such as ours are difficult 'because cases brought in admiralty in which neither party is a shipowner or in some way related to a maritime contract are very rare.' "

"The Supreme Court has sustained the application of state laws which *broaden the scope of liability beyond the general maritime standard.* See *Hess v. United States,* 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960); *Just*, supra. See also *In re M/T Alva Cape,* 405 F. 2d 969-970 (2d Cir., 1969)." *St. Hilaire Moye,* supra, at Page 980. (Emphasis Added).

Moreover, Appellant at bar respectfully submits that while the *Moragne* decision gave birth to a new cause of action in admiralty for wrongful death, it does not exclusively set out the standards of conduct (i.e. negligence, stict liability, vicarious liability, etc.) by

which a maritime tort feasor may be measured in such cases as long as those standards are not incongruous to the maritime law. On the contrary, the Supreme Court left open such aspects for the sake of flexibility. In *Dennis v. Central Gulf Steamship Corporation,* 453 F. 2d 137, (5th Cir., 1972), the United States Court of Appeals, Fifth Circuit, stated:

> While "there is now a cause of action for wrongful death in admiralty that is not dependent on adjacent state law", *Hornsby v. Fish Meal Company,* 5 Cir., 1970, 431 F. 2d 865, federal courts may look to state law and adopt it as the general maritime law if it is not inimical to the maritime law. *Romero v. International Terminal Operating Co.,* 1959, 358 U.S. 354, 391 n. 3, 79 S. Ct. 468, 3 L. Ed. 2d 368 (Brennan, J., concurring) . . .
>
> As *Moragne* teaches, it would be anomalous for us to take away a pre-*Moragne* remedy which is almost universally available by the application of state survival statutes when there is no federal maritime policy against such recovery." ' . . . (Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' (*The Sea Gull,* 21 Fed. Cas. 909, 910 (No. 12, 578) (C.C. Md. 1865)." *Moragne* 398 U.S. at 387, 90 S. Ct. at 1781.

See also *Winter v. Eon Production, LTD,* 433 F. Supp. 742, Ed. La. (1976), wherein Judge Rubin discusses

permissable areas of state regulation of maritime affairs where there is sufficient state interest and no contradictions with the general maritime law.

In light of the above, it is submitted that Louisiana strict liability law is applicable to the case at bar and should supplement the general maritime law. This state body of law is neither inimical nor prejudical to the body of maritime law as shown heretofore.

In addition, Louisiana has a substantial state interest in protecting its citizenry from hazardous obstructions maintained within its navigable territorial waters. Therefore, Louisiana strict liability law and principles should be considered in the determination of this maritime wrongful death case under either the maritime augmentation/supplementation doctrine or maritime choice of law.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

s/Huntington E. Downer

HUNTINGTON E. DOWNER
WAITZ, DOWNER & BEST
423 Goode Street
Houma, Louisiana 70360
504/876-0870
Attorney for Appellant

s/Michael J. Samanie

MICHAEL J. SAMANIE
SAMANIE AND BARNES
(A Professional Law Corporation)
525 East Park Avenue
Houma, Louisiana 70360
504/868-8223 or 504/524-3615
Attorney for Appellant

APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3214
Summary Calendar

CINDY FORET
Plainfiff-Appellant

v.

UNITED GAS PIPELINE COMPANY,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

(December 9, 1980)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

On November 29, 1977, three duck hunters were proceeding in a sixteen foot motor boat along a canal south of Houma, Louisiana. Appellant United Gas Pipeline Company (United) has a pipeline right in the canal. The boat entered the intersection of the canal and Bayou Chauvin and struck a piling which was protruding fourteen to eighteen inches above the water and was in plain view from the direction the boat approached,

The boat was owned by Donald Lambert and was being operated by Paul Crochet. The other passenger was Paul Crochet's son-in-law, Daniel Foret. The evidence shows the boat was traveling at from fifteen to twenty miles per hour and did not slow down at the intersection of the canal with Bayou Chauvin.

Apparently, Daniel Foret was standing in the boat and saw the piling and called a warning to Crochet. The boat however was so close that the attempt to slow and maneuver did not avoid a heavy collision. All occupants of the boat were thrown out into the water. All three men were dressed in duck hunting gear and were wearing their hip boots. Although there were life jackets in the boat, none of the men were wearing them. Only Paul Crochet survived. Both Donald Lambert and Daniel Foret drowned.

This suit consists of two consolidated claims originally brought in state court against United by Cindy Foret, the widow of Daniel Foret, individually and as administratrix of Daniel Foret's estate, and her father Paul Crochet. After removal to federal court, Crochet was tendered as a defendant to Mrs. Foret under Rule 14(a) F.R.C.P. A cross-complaint was brought against Crochet by United.

The suit was tried as an admiralty case in the federal court without a jury. The judgment dismissed both Mrs. Foret's and Mr. Crochet's claims against United. Judgment was rendered in favor of Foret's claim against Crochet in the sum of $145,557.02 on the ground that Crochet's negligence was the sole substantial cause of the accident but that Daniel Foret was

twenty-five percent negligent in causing his own death by standing in a boat wearing hip boots and without a life preserver when the boat was moving at a substantial rate of speed through waters in which obstructions could be anticipated.

Cindy Foret appeals from the judgment. Crochet did not participate in the appeal. It is clear that the core of this appeal is the dismissal of her claim against United, although she also challenges the measure of damages. The damages issue will be discussed later.

Initially, United asserts that the entire case is moot because at Foret's reguest the trial court rendered judgment against Crochet and in the same judgment her claim against United was dismissed. Since Crochet did not participate in the appeal, United takes the position that the judgment in this case is final.

This assertion by United cannot be accepted. Mrs. Foret made clear in her notice of appeal she was preserving all of her rights. Her rights obviously include an appeal from the dismissal of United and also an appeal against whatever aspects of the judgment rendered against Crochet she wishes to challenge.

On the matter of the dismissal of her claim against United. Foret insists that there was error both in the findings of fact and conclusions of law of the District Court.

In reaching its conclusion that United was not liable, the District Court relied upon the standard of liability set out in Spinks v. Chevron Oil Co., 507 F.2d

216 (5 Cir. 1975). *Spinks* requires that a defendant's negligence "must be a substantial factor in bringing about the harm, with no rule of law relieving the actor of fault." p.223. The District Court found no negligence by United operating as a substantial factor. On the basis of the evidence the Court concluded that "the *sole* substantial factor in causing the accident was the negligence of the plaintiff Crochet, . . . " (emphasis added).

Since the evidence showed that the piling was well above the water, was located in a place where a boat should proceed with great caution, was easily visible for a substantial distance before the boat collided with the piling, and there was adequate room to maneuver around the piling, the finding of the trial court is not "clearly erroneous" and must be affirmed.

The application of the law to the facts by the District Court also is correct. *Spinks* controls. It requires a finding that negligence charged to the defendant "must be a substantial factor in bringing about the harm". The finding that Crochet's negligence was the "sole substantial factor" precludes any liability by United. This conclusion makes unnecessary any inquiry as to whether United was responsible for the piling being located in the intersection of the canal with Bayou Chauvin. Whether or not United by having a pipeline easement in the canal was responsible is irrelevant to the decision in this case.

Finally, on the issue of liability of United, Mrs. Foret urges that the principles of strict liability should be applied. While no cases closely in point are cited, she argues that Louisiana law requires strict liability

and that admiralty law should require strict liability.

The law does not support this contention by Foret. In 1970, the Supreme Court created a nationwide uniform admiralty wrongful death action in Moragne v. States Marine Lines, Inc., 398 U.S. 375. Nothing in that case nor its progeny, *e.g., Dennis v. Central Gulf S.S. Corp.*, 453 F. 2d 137, 140 (5 Cir.), *cert. denied,* 409 U.S. 948 (1972), establishes a wrongful death action based upon strict liablilty. *See also* Daigle v. Point Landing Inc., 616 F. 2d 825 (5 Cir. 1980). Further it obviously would thwart the entire purpose in the court's holding in the *Moragne* case to allow diverse state law governing liability to apply.

It must be concluded that the District Court properly applied the law to the facts of this case.

On the matter of damages, the District Court made no award of damages for loss of services, decedent's pain and suffering, nor funeral expences. Yet these items were claimed and are compensable. Dennis v. Central Gulf S.S. Corp., *supra.* The case should be remanded for the limited purpose, if Mrs. Foret wishes, to determine damages for these items as part of the judgment against Crochet.

The twenty-five percent reduction in damages occasioned by decedent's negligence is not clearly erroneous and must be affirmed.

The judgment dismissing plaintiff Foret's claim against United Gas Pipeline Company must be affirmed. the case needs to be remanded to the District Court for the limited purpose of determining additional

damages against Crochet based upon loss of services, decedent's pain and suffering, and funeral expenses.

AFFIRMED in part, REVERSED in part and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3214
Summary Calendar

D.C. Docket No. CA-78-4152 "A"

CINDY FORET,
Plaintiff-Appellant,

versus

UNITED GAS PIPELINE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party shall bear his own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION
No.: 80-3214

CINDY FORET,
individually and as Administratrix
of the Estate of Daniel Foret -
Appellant

VERSUS

UNITED GAS PIPELINE COMPANY,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Cindy Foret, plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment affirming the trial court's decision, entered in this action on January 2, 1981. This appeal is taken pursuant to 28 U.S.C. §1254.

January 9, 1981.

Respectfully submitted,

LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Ave.
Houma, Louisiana 70360
Telephone: (504) 524-3615
/s/ MICHAEL J. SAMANIE
Michael J. Samanie

s/s HERBERT W. BARNES
Herbert W. Barnes

BEFORE ME, the undersigned Notary Public, personally came and appeared Herbert W. Barnes, who after being duly sworn did depose that he served (3) copies of the above pleading in compliance with United States Supreme Court Rule 33 (1) by depositing the same in the United States post office with first class postage prepaid, addressed to counsel of record at his post office address this 9th day of January, 1981.

/s/ HERBERT W. BARNES
Herbert W. Barnes

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9
DAY OF JANUARY, 1981 in HOUMA,
LOUISIANA

/s/ MICHAEL P. PELLEGRIN
Michael P. Pellegrin
NOTARY PUBLIC

CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, Which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.

s/ Michael J. Samanie

/s/ MICHAEL J. SAMANIE
Counsel for Appellant

Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-68

IN THE

Supreme Court of the United States

October Term, 1980

CINDY FORET
Appellant

v.

UNITED GAS PIPELINE COMPANY, INC.
Respondent

On Appeal from the United States Court of Appeal, Fifth Circuit, New Orleans, Louisiana

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

HUNTINGTON E. DOWNER
WAITZ, DOWNER & BEST
423 Goode Street
Houma, Louisiana
Attorney for Appellant

MICHAEL J. SAMANIE
LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Avenue
Houma, Louisiana
Attorney for Appellant

HERBERT W. BARNES
LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Avenue
Houma, Louisiana
Attorney for Appellant

SUPPLEMENTAL TABLE OF CONTENTS

APPENDICES

Page

JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA 23

REASONS FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA 24

CERTIFICATE OF SERVICE 34

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CINDY FORET, ETC., ET AL	CIVIL ACTION
VS	NO. 78-4152
UNITED GAS PIPELINE CO.	SECTION "A"

JUDGMENT

Considering the written reasons on file herein, and counsel informing the Court that plaintiff, Foret does not waive any rights or claims against any party or parties, and pursuant to Rule 9 (b), accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Cindy Foret and against Paul C. Crochet, for the sum of $145,557.02.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff, Cindy Foret, individually and as administratrix of the estate of Daniel Foret, against the defendant, United Gas Pipeline Co. be dismissed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third party complaint of United Gas Pipeline Co. against Paul C. Crochet is hereby dismissed.

New Orleans, Louisiana, this 22nd day of Februar-y, 1980.

/s/ NELSON B. JONES
Nelson B. Jones, Clerk

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

(Filed February 22, 1980)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL C. CROCHET	CIVIL ACTION
VS	No. 78-4151
UNITED GAS PIPELINE CO.	SECTION "A"
CINDY FORET, ET AL	CIVIL ACTION
VS	No. 78-4152
UNITED GAS PIPELINE CO.	SECTION "A"

(CONSOLIDATED MATTERS)

(Filed February 6, 1980)

SCHWARTZ, J.

This matter was tried to the Court, without a jury on a former day, at which time the matter was taken under submission. Now, after due consideration of the evidence adduced at the trial, the arguments and memoranda of counsel, the record and the law, the Court finds as follows:

To the extent that any of the following findings of fact constitute conclusions of law they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

FINDING OF FACT

THE SCENE

The causes of action arise from a collision of a sixteen foot pleasure craft and a piling located near the bank on the eastern side of the intersection of Bayou Chauvin and defendant United Gas Pipeline Company's canal in South Terrebonne Parish, Louisiana.

On November 29, 1950 defendant was granted a right of way from the landowner for the construction of a gas pipeline across Bayou Chauvin. In exercising this right it ran a pipeline known as "Napoleonville 20 inch Line." Defendant built a canal which runs directly above the pipeline for the purpose of maintaining the pipeline. Although the history of the piling involved in the collision is sketchy, it appears to be the remaining part of a "lilly gate." Water lillies grow rapidly in this area and two lilly gates were used to help keep the canal free of lillies which could hamper navigation thereon. Construction of these lilly gates was accomplished by placing a piling at each corner of the intersection of the pipeline canal and Bayou Chauvin. Attached to each piling was a boom which stretched across the canal. The booms were locked shut but company employees were provided with a key, which they used to open the booms, making the canal accessible to them on their periodic maintenance checks.

Approximately fifteen years ago, modern methods of lilly control replaced the use of gates or dams. the pipeline canal was built in 1952 and was originally forty feet wide. However, substantial soil erosion has occurred since that date so that the piling is now approximately 12 to 15 feet from the bank. No records of the building of the lilly gates are extant and there is no evidence as to who built them.

Several of defendant's employees testified regarding the company's policy for maintenance of the pipeline. The employees were instructed to remove obstructions, that is, anything which would interfere with the maintenance of the pipeline or was a hazard to navigation on the canal. Defendant's employees testified that they could not remove anything placed on the property by the landowner without first seeking its

rmission. They never sought permission to remove the pilings nor did they believe same was an obstruction or a hazard to the use of their servitude. The pilings were not marked and appeared to have extended normally from 12 to 18 inches above the water line. United Gas Pipeline Co. was aware that the pipeline canal was used from time to time as a navigable waterway by the public for the purpose of hunting and fishing.

THE ACCIDENT

On the morning of November 29, 1977, Daniel Foret, his father-in-law, Paul Corchet, and a friend, Donald Lambert, went duck hunting in the area surrounding Bayou Chauvin. They traveled in a 16 foot fiberglass boat owned by Lambert and operated at all times relevant hereto by Crochet. The boat was equipped with a 60 h.p. motor and carried three life preservers and flotation cushions. Plaintiff Crochet alleges that approximately 1:00 P.M. the boat was proceeding west on defendant's pipeline canal towards Bayou Chauvin at an estimated speed of 15 to 25 miles per hour when it struck a piling later identified as being on the eastern side of Bayou Chauvin at the intersection with the pipeline canal. Crochet also claims that just prior to the collision he was sitting at the controls in the rear of the boat; Lambert was seated in the bow; and Foret was standing to his left looking for a place to hunt. All passengers in the boat were wearing hip boots and none were wearing life preservers. The weather was overcast and misty.

Crochet testified that he was looking ahead with an unobstructed view but that he did not see a piling, and that Foret, who looked ahead, back and ahead again, suddenly shouted, "Watch out for that piling," whereupon he instantly slowed the boat and swerved

to the left to avoid a group of water lillies which he claimed obscured the piling.[1] As a result of the impact with the piling according to Crochet, all three men were thrown into the water and immediately surfaced. Foret called to him and attempted to help Lambert. Thereafter, Foret and Lambert disappeared below the surface and drowned.

Crochet claimed he was in the water for about ten minutes, then removed his boots and swam to shore. Thereafter he swam across Bayou Chauvin to reach the boat which was grounded on the opposite shore.

Mr. Stuart Scheers, who operates a commercial hunting lease over some 4000 acres near the site of the accident, testified that he and his helper were patrolling his lease for poachers and heard shots coming from the north side of his lease. They followed the sound of the shots and came upon Crochet in an agitated state running the boat more or less aimlessly up and down the pipeline canal. Scheers, after several minutes of conversation with Crochet, learned that two men had drowned. He left his aide at the scene and he and Crochet went to report the accident to the authorities. Thereafter, Scheers and Crochet returned with rescue and investigative officers from local sheriff's office. Deputy Jodi Robichaux and Scheers pulled Foret's body from the water. Scheers stated that the water was no more than five feet deep at the place where the bodies were found. Crochet testified that the men were in the water over their heads when they drowned. Foret's face was damaged and Scheers described the damage as appearing to have been caused by a gunshot

[1] Plaintiff gave a statement (Deft. Ex. 20) to the investigative officers wherein he described the accident. In this statement he does not mention that the water lillies obscured his vision of the piling or that they in any other way contributed to the accident.

wound. Pieces of Foret's lips, chin and eyebrows were missing. Robichaux was not asked any questions regarding the condition of Foret's face nor did he testify regarding such. Lambert's body was retrieved from a spot a few feet away and was not marred in any way.[2]

Scheers further testified that he saw a shotgun, expended shells and dead ducks in the boat. Crochet testified the ducks had been killed earlier in the day when they were hunting from a duck blind. However, no explanation for the expended shells was offered.

THE PILING

Crochet claims that he was unable to see the piling and that it was obscured by water lillies. Defendant's employees who were familiar with the intersection testified that the piling generally protrudes from the water 8 to 12 inches at high tide and 12 to 18 inches at low tide; that they never perceived it as a hazard to navigation; and that barges were easily able to navigate the canal between the pilings. The investigating officers reported the piling when they arrived on the scene to be approximately 18 inches above the water. Scheers testified that 14 to 16 inches of the piling were exposed and he further testified that although there were some lilles along the shore at that time of the year, none were in the area of traffic. Scheers testified that he passed that intersection almost daily for the last several years and does not recall seeing the pilings under water except in extreme weather conditions such as when a hurricane threatens. Photographs (Exhibits 23, 24 and 25) introduced into evidence by plaintiffs show that the piling was approximately 12 inches above the

[2] The autopsy report identifies the damage to Foret's face as resulting from crab bites. Dr. Sidney Warren who performed the autopsies on both bodies testified that he based this explanation of Foret's facial damage on the circumstances of the accident as explained to him by the investigating officers. He further stated that crab bites seemed the most logical explanation at the time. He had no independent recollection of this incident and could not explain why only Foret's face was so damaged and that there was no similar damage to Lambert's body.

water, with no barnacle line showing. A barnacle line is apparent in Defendant's Exhibits 10, 11 and 12. Thus, the best evidence of the height of the piling above the water at high tide is 12 inches.

Although Crochet claims it was high tide at the time of the accident plaintiffs introduced no corroborating evidence indicating at what time of day it was high tide on the date of the accident, and the photographs introduced in evidence do not support his claim of high water. There was credible testimony from other witnesses to the effect that at this particular time of the year, i.e., during the winter season, tides in this area were generally low. In the absence of further proof it would be pure speculation to conclude that the tide in winter or on the date of the accident reached the high water mark indicated by some of the pictures on the bank.

Furthermore, since Foret was able to see the piling it obviously was exposed. Likewise, the moving picture photographs of the accident scene which were viewed by the Court, showed the piling to be above the water and visible from quite a distance.

Thus, the Court concludes that there is no reliable evidence [3] that the piling at the time of the accident was exposed less than 14 to 16 inches and probably was exposed approximately 18 inches as testified to by the investigating officers and as shown by the films taken in winter (Plaintiff's exhibits 20, 21,22). [4]

[3] In addition to Crochet's testimony being at variance with that of other witnesses and physical evidence, other factors in ascribing the weight and effect which has been accorded to his testimony are: the original investigative report includes Crochet's handwritten statement (Exhibit United Gas No.20) reporting that he was approaching the intersection traveling down Bayou Chauvin rather than down defendant's canal; his testimony regarding his unfamiliarity with the area is not consistent with an experienced hunter and fisherman proceeding through a unfamiliar maze of waterways without the benefit of a chart and running the risk of becoming lost, nor is it consistent with his knowledgeable testimony of the area while testifying and explaining Exhibits 4 and 5 (the chart of the area); his failure to explain, if he were in fact looking ahead and traveling at a reasonable rate of speed, why he would be heading through the alleged cluster of water lillies when there was ample space to avoid it; his apparent shock (as reported by Sheers) after the deaths could have colored his recollection of physical conditions and what transpired prior to the accident.

[4] The court rejects the testimony of plaintiff's witness Michael Tivet, the only witness who testified that he had seen the piling under water, as the Court finds his testimony to be lacking in credibility.

The Court is of the opinion that Foret should not have been standing in a small speedboat traveling through unknown waters at a speed of 15-20 miles an hour, wearing hip boots, and without a life jacket. Regardless of whether or not he was required to wear a life jacket prudence indicates that under the circumstances it was reckless of him to expose himself to danger in such a manner.

CONCLUSIONS OF LAW

This cause of action is a maritime tort and is cognizable under the admiralty jurisdiction of this Court. The suit is properly removed from the state courts and venue is proper in the Eastern District of Louisiana.

Plaintiff, in furtherance of his claim alleges that the piling at issue is the proximate cause of this collision and that defendant breached an affirmative duty to remove or mark such hazard to navigation. Defendants deny same and allege that plaintiffs' negligence was the proximate cause of the accident.

Although it has been briefed by the parties, the Court need not address the issue of whether or not the landowner or the defendant as owner of the servitude owed a duty to plaintiffs in this case because we find the piling is not the proximate or legal cause of this collision.

In order for plaintiffs to sustain their burden of proving every element of their claim herein by a preponderance of the evidence, the Court must conclude that defendant has both breached a duty with respect to the piling in question and that such failure was the cause of the accident. The plainfiffs have failed

to prove by a preponderance of the evidence that the piling was not in plain view on the date in question. Having made this determination, it is appropriate to apply the concept of legal cause with respect to the casualty.

In *Spinks v. Chevron Oil Company*, 507 F. 2d 216 (5th Cir. 1975) the Fifth Circuit replaced the concept of proximate cause as applied in maritime tort cases with the modern theory of legal cause. The Court, quoting from the American Law Institute Restatement 2d of Torts, stated:

> "The elements of legal cause are negligence, a causalconnection between the negligence and the injury, the invasion of a legally protected interest, and a lack of a countervailing legally protected interest as a defense to liability. The defendant's negligence must be a substantial factor in bringing about the harm, with no rule of law relieving the actor of fault. 'Substantial' means more than 'but for' the negligence, the harm would not have resulted and more than merely negligible negligence. The gist of it is that some responsibility for the effect must accompany the cause. *Supra*, at P. 223.

Under either a proximate or legal cause analysis, the law requires that the consequences of the risk assumed be generally foreseeably by a reasonable man under similar circumstances; it does not require that the precise chain of events leading to the particular injury in question be foreseeable. *Olympic Towing Corp. v. Nebel Towing Corp.* 419 F. 2d 230 (5th Cir. 1969) cert. den., 397 U.S. 989, 90 S.C. 1120. *Ionmar Compania etc. v. Central of Ga. R. Co.*, 471 F. Supp. 942 (S.D. Ga. 1979).

The evidence in this case does not support the contention that on the date of the accident the piling was a hidden hazard. On the contrary the evidence supports the conclusion that it was open and obvious and could or should have been seen by any person exercising reasonable care. Defendant had the right to expect that anyone making use of its private pipeline canal would proceed at a reasonable speed and see what could be seen. Moreover, since there was more than ample space for any type of vessel, boat or barge that could be used in this canal to pass without striking the piling, defendant could not have reasonably anticipated that someone would strike it. In summary, we find that the sole substantial factor in causing the accident was the negligence of the plaintiff Crochet, and not the defendant's failure to remove or mark the piling.

In addition, we find as noted in the aforesaid findings of fact that Foret failed to exercise reasonable care for his own safety and thus he was guilty of contributory negligence which we assess at 25%. *St. Hillaire Moye v. Henderson*, 364 F. Supp. 1286 (E.D. Ark, 1973), aff'd 496 F. 2d 973 (Cir. 8 1974), cert. den., 419 U.S. 884; *Palmer v. Ribax, Inc.*, 407 F. Supp. 974 (M.D. Fla. 1976); *Griffith v. United States*, 180 F. Supp. 454 (D. Wy. 1960).

During the trial and in pre-trial and post-trial memoranda all parties appear to have neglected to take into consideration that defendant pursuant to Rule 9 (b) tendered plaintiff Crochet as a defendant to plaintiff Foret. Therefore, in view of our conclusions

that Crochet's negligent actions caused the accident, there should be judgment herein in favor of Foret, against Crochet. However, since plaintiff Cindy Foret is the daughter of Paul C. Crochet and both plaintiffs were represented by the same parties, we will presume this claim is waived and/or is not the desired result of our conclusions with respect to Crochet's negligence.

Accordingly, we will not order entry of judgment herein by the Clerk for ten days in order to give plaintiff Foret an opportunity to respond to these observations.

Specifically, we find that Plaintiff Cindy Foret would be entitled to recover as follows:

Loss of income to date of trial	$19,503.52
Loss of future income discounted at 7%	137,572.50
Loss of Society	40,000.00
	$194,076.02
Less plaintiff's contributory negligence of 25%	48,519.00
Total	$145,557.02

If plaintiff Foret does not respond in ten days the Clerk of Court will be ordered to enter a judgment in both proceedings Nos. 78-4151 and 78-4152 dismissing both causes of action at plaintiffs' costs. If plaintiff Foret advises she has not waived her claim against plaintiff Crochet, there will be judgment herein in favor of Cindy Foret against Paul C. Crochet in Proceedings No. 78-4152 in the sum of $145,557.02.

New Orleans, Louisiana, this 6th day of February, 1980.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of the Supplemental Appendix to Jurisdictional Statement, service has been made upon all parties of record.

/s/Michael J. Samanie
Counsel for Appellant